



# ***GUIDANCE FOR MUNICIPAL STORMWATER FUNDING***

**Prepared by the  
National Association of Flood  
and Stormwater Management Agencies**

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## **EXECUTIVE SUMMARY**

Municipal stormwater management for local governments has evolved over time from an urban flood control function, to a water and resource management function, to an environmental protection and regulatory function. All three functions now co-exist as responsibilities of local government. This evolution has forced changes in how stormwater systems are planned, designed, constructed, operated, and financed. More specifically, the stormwater function has evolved from a basic capital construction and maintenance program supported primarily by local taxes, to a program of integrated water resource management, environmental enhancement, and recreational services requiring a multi-faceted benefit based finance system.

The focus of this guidance is to provide a resource to local governments as they address contemporary stormwater program financing challenges. The guidance includes procedural, legal, and financial considerations in developing viable funding approaches. The guidance examines a range of possible approaches to paying for stormwater management, but the focus is on guidelines for developing service/user/utility fees to support these programs. The terms service fee, user fee, and utility fee may be used interchangeably in this guidance. Chapter 2 addresses various sources of funding. Chapter 3 covers legal considerations, and implementation of stormwater funding programs is discussed in Chapter 4.

### **SOURCES OF FUNDING**

“Needs” are the key driver of stormwater programs and funding development. Without a well defined stormwater service need, there will not be basic support and success will be less likely. When considering how to develop and finance a stormwater program it is important to prepare a business plan that identifies strategic decisions and guides the program evolution and funding decisions. Emerging trends in funding practices include increasing complexity, blended funding, multi-jurisdictional funding, cost-sharing with other public programs,



broader private sector participation, and increasing influence of technology and data.

Stormwater management has historically been supported by a range of funding methods and mechanisms that reflect a mix of federal, state and local programs. While the focus of this guidance is on service fees, other stormwater program funding mechanisms include general revenue appropriations; plan review, development inspection, and special user fees; special assessments; bonding for capital improvements; in-lieu of construction fees; capitalization recovery fees; impact fees; developer extension/latecomer fees; and federal and state funding opportunities such as grants, loans and cooperative programs.

There are several criteria that are commonly used to evaluate and select methods for design of service fee rate structures. They include legality, equity, revenue sufficiency, flexibility, balance of rates with level of service, data requirements, compatibility with data processing systems, consistency with other local funding and rate policies, and revenue stability and sensitivity. The fundamental objective of a service fee/utility is attainment of equity. Service fee rate methodologies are designed to attain a fair and reasonable apportionment of cost of providing services and facilities.

Design of stormwater service fees must meet general and technical standards. A rate structure analysis is performed to determine how costs might be apportioned among those who are served in various ways by expenditures for maintenance and operations, capital improvements, and support activities. Impervious area, gross area, percentage imperviousness, and land use are the parameters most frequently used to determine rate structures. Services fees are generally cost-based and are designed to reflect the impacts that each property has on stormwater service demands. Such costs are primarily a function of the peak stormwater runoff rate, the total volume of discharge, and pollutant contributions.

There are four rate structure concepts or methodologies used as examples in this guidance that are typical of those adopted in the more than five hundred communities that have established stormwater utilities. These examples base their fees on impervious area, a combination of impervious area and gross area, impervious area and the percentage of imperviousness, and gross property area and the intensity of development.

## **LEGAL CONSIDERATIONS**

The type of funding mechanism selected for a stormwater utility or stormwater management program has a variety of legal consequences. Taxes, service fees, special assessments, impact fees and other revenue sources can be used, but each approach will have different implications in terms of who will pay, what procedures must be followed to implement and collect the charge, and how the

money can be used. If the funding approach is deemed to be a tax, then tax-exempt entities such as churches, schools, state agencies and federal government facilities will contest their obligation to pay. If a service fee approach is used, the reasonableness of the rate structure and its relationship to the service being provided may be challenged. In many states special taxpayer approval must be sought.

The distinctions between the various funding approaches are often blurred. In general, a tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called upon to perform. Many states have constitutional or statutory restrictions on the ability of local governments to levy taxes, which do not apply to fees or charges.

User/service fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Fees have traits that distinguish them from taxes. First, they are charged in exchange for a particular governmental service which benefits the party paying the fee. Second, they are voluntary, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. Third, the amount of the fee is designed to recover the actual cost of the service being provided. In some cases there may be little practical difference between a tax and a fee, but the legal distinctions between the two are important.

Stormwater service fees have been the subject of litigation resulting in reported opinions from at least 17 states, including many cases involving final decisions by the state's highest court. In addition, there have been unreported decisions from lower courts in states that have involved similar challenges to local stormwater fees. Based on these cases, certain common themes have emerged.

The question of whether a service charge is actually a "tax" has been the issue most frequently litigated. Other reoccurring issues involve whether or not the charge is voluntary, is it a fee or special assessment, is the fee "reasonable" and directly related to the cost of providing the service, are the properties charged fees receiving proportionate benefit from the services provided, and must fees be confined to cost of providing stormwater services alone or may any surplus be applied to capital improvements.

Determining the legality of a specific financing mechanism chosen will depend upon a close analysis of state law. Nevertheless, certain general principals emerge from the cases examined. First, for a stormwater service charge to be regarded as a fee, rather than a tax, the overall cost of the program must be reasonably related to the service being provided, and the funds raised must be segregated for use by the stormwater program. Second, the fee should be proportional to the property's contribution to stormwater runoff. Third, participation in the program should be characterized as "voluntary". And forth, in

states with constitutional provisions governing the imposition of any new tax, it may be necessary to seek voter approval for a fee even if it is designed to be service-based.

The imposition of stormwater service fees on federal facilities involves a special consideration of the tax vs. fee issue. In principal, states cannot tax the United States (Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 1819). On the other hand, it is well-established law that the United States must pay reasonable user fees. Furthermore, the Clean Water Act contains an express waiver of sovereign immunity for certain pollution control related fees. Importantly, this waiver applies only to fees or service charges, and not to taxes.

The United States Supreme Court has established a three-pronged test for determining whether fees imposed on federal facilities are "reasonable service charges" or taxes. First, is the fee or service charge non-discriminatory? Second, is it a fair approximation of the cost of the benefits received? And third, is it structured to produce revenues that will not exceed the regulator's total cost of providing the benefits?

## **IMPLEMENTING USER-FEE BASED FUNDING**

The evolution in stormwater program expectations, which is motivating the movement to utility based funding, requires that more than just the revenue mechanism be evaluated. The function, service and performance of the stormwater program itself become a focal point in the effort to develop a stormwater funding mechanism.

A stormwater utility should be seen as an umbrella under which individual communities address their own local problems, priorities and practices. A stormwater utility provides a vehicle for:

- consolidating or coordinating responsibilities previously dispersed among several departments;
- generating funding that is adequate, stable, equitable and dedicated solely to the stormwater function; and
- developing programs that are comprehensive, cohesive and consistent year-to-year.

Implementing user fee based funding involves a related set of actions and activities occurring within a flexible process framework. That framework promotes "due diligence" in five key areas of focus; political, financial, legal, informational, and technical. Bringing about change in the current stormwater program and implementing user based funding requires an understanding of current needs and problems, a vision for the future and a process framework.

The use of a citizens/stakeholder participation group and a business plan approach can help build a compelling case for action.

The process framework should include a “quick concept study” which assesses the advisability of proceeding; a “feasibility study” which conducts the detailed assessment of the stormwater program and funding and develops recommendations; and, the “utility implementation process”.

The utility implementation process directs the planning and implementation effort along four tracks of activity. The “Public Track” insures stakeholder involvement and education. The “Program Track” matches program structure to stakeholder expectations. The “Finance Track” insures the legality, equity and adequacy of the funding mechanism; and, the “Database Track” determines the means to compute, deliver, collect and record the charge to be imposed on each property.

The analysis of stormwater utility funding has many policy implications. Policy making usually involves the mayor and council. Day-to-day policy decisions are often made at several levels under guidance set by the mayor and council. A recommended hierarchy for review of important issues is: key staff and consultants, other involved staff, advisory committee, manager’s office, and mayor and council.

## **CASE STUDIES**

Five case studies are examined for City of Bellevue, Washington; City of Charlotte/Mecklenburg County, North Carolina; City of Tulsa, Oklahoma; Louisville/Jefferson County Metropolitan Service District, Kentucky; and Sarasota County Stormwater Environmental Utility, Florida. For each example the following is generally provided: keynotes, community profile, formation process, service area, role and program, local government structure, organization and staffing, funding, inter-governmental cooperation, and public participation.

The City of Bellevue stormwater management program was established in 1974 and was one of the first to give equal consideration to water quantity and quality. Bellevue’s Storm and Surface Water Utility provides a full range of capital infrastructure and operational services, primarily through in-house staff. Funding is primarily derived from a user fee that is based on gross property area and a factor reflecting the intensity of development of each property. Residential fees range from \$3/month to over \$20 per month with an average of about \$10/month. The annual operating budget is approximately \$6 million. The population of Bellevue was about 117,000 in 2005.

The Charlotte/Mecklenburg County approach relies on centralized funding and regional programs for major systems combined with local management of minor stormwater systems. The County, City of Charlotte, and towns have a high

degree of self-determination in deciding service levels to be provided by local systems, programs and funding. Funding of the program is primarily supported by a composite stormwater service fee that includes both regional and local components with the County controlling the regional component and local governance controlling the local component. The City of Charlotte and small towns typically employ a blend of funding from several sources while the County relies almost entirely on the service fee.

In 2005 the population of Mecklenburg County was about three quarter million and the population of Charlotte was about 650,000. The County utility was instituted in 1994. The total stormwater budget for all entities in 2005 was over \$85 million with a large part allocated to capital betterments. The fee for a single-family house is \$1.06/month throughout the County. Local stormwater programs of the County, cities and towns are funded by a separate additional rate component which ranges from \$0.30/month to \$6.72/month in Charlotte.

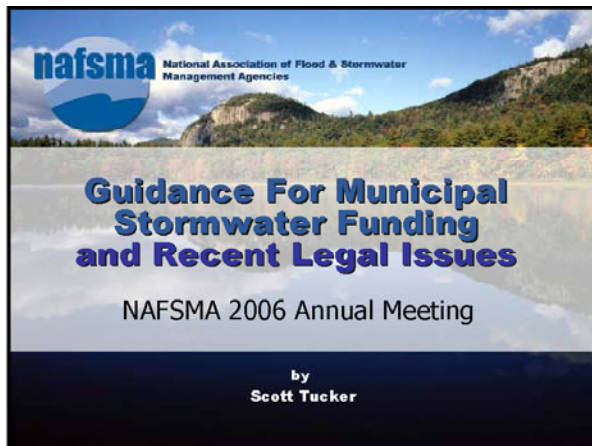
The Tulsa Stormwater Management Utility was founded in response to a devastating flood that killed 14 people and caused nearly \$220 million in property damage in 1984. A Department of Stormwater Management was established in 1985 centralizing responsibility for all City stormwater activities, and a stormwater utility fee was established by ordinance in 1986 to fund the program. The stormwater program budget has recently ranged from \$12 million to \$14 million per year. All residential properties are charged a single rate of \$3.49/month, and fees for other properties are based on the amount of imperviousness on each property. The population of Tulsa was about 400,000 in 2005. The program includes comprehensive watershed management, dedicated funds for maintenance and operation, and a \$200 million capital improvements program.

The Louisville approach involves a consolidation of flood control and stormwater management with a regional wastewater collection and treatment program provided by the Metropolitan Sewer District (MSD). Most of the smaller cities and towns in Jefferson County do not perform stormwater management functions. Funding of MSD is primarily from wastewater and stormwater service fees, which are independently structured and billed. The accounting is kept separately for each function.

The methodology of determining the stormwater fees in Louisville/Jefferson County is based on impervious area. There is flat rate for single-family residential properties, and differential rates for other properties based on a impervious area equivalency unit. The single-family residential stormwater service fee in was \$4.41/month. Stormwater service fee revenues in fiscal year 2005 were expected to be nearly \$24 million. There are more than 90 cities and towns in Jefferson County. Most, but not all, cities are included in the stormwater program. Louisville had a population of about 700,000 in 2005.

Sarasota County, Florida established a Stormwater Environmental Utility in 1989. Primary objectives of the Utility are to reduce flooding, improve surface water quality, and attain responsible development practices. A Florida Supreme Court decision in 1996 determined that the Sarasota County charge is a special assessment rather than a service fee. As such, it is subject to the standards applicable to assessments, which emphasize apportionment of special benefit, rather than reflecting the cost of service burden imposed on properties. The benefit assessments have three components that are consistent across the service area, and one component, system capitalization, that is variable by watershed.

The Utility budget in 2005 was approximately \$23 million with about \$10 million for capital projects. The benefit assessment takes both pervious and impervious areas on each property into account. On average, a medium size single-family residence is assessed \$6.70/month. Sarasota County had a resident population of about 340,000 in 2005. There are four cities in the County. The city of Sarasota through an inter-governmental agreement relies on the County to improve its drainage system and perform most stormwater operations. The other three cities retain responsibility for local stormwater systems.



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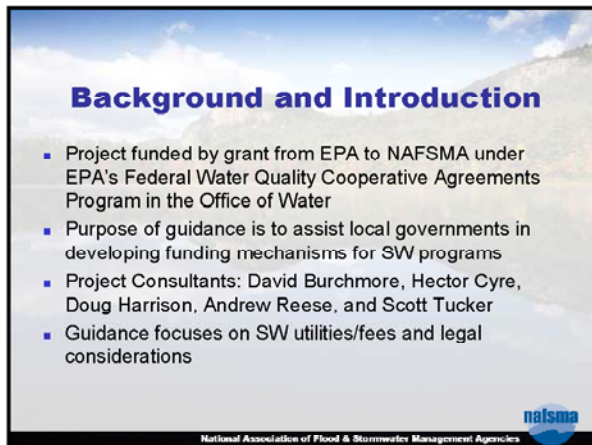
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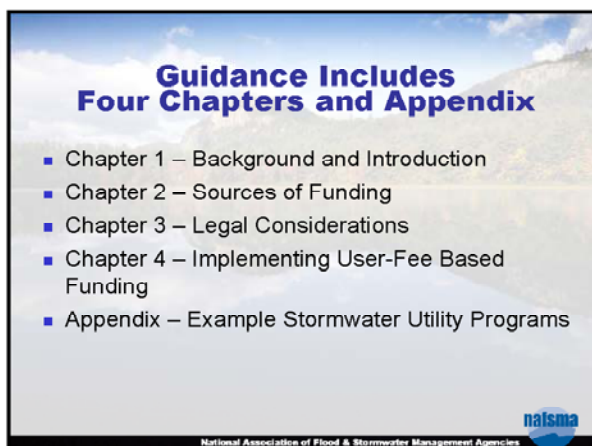
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## How to Obtain

- Can download from NAFSMA website
  - [www.nafsma.org](http://www.nafsma.org)
  - There is a link to the Guidance Manual on the NAFSMA homepage



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## Today's Presentation

- Brief summary of Content with focus on Chapter 3 – Legal Considerations
- Summary of King County Funding Decision
- Summary of Dallas Consent Decree
- Summary of California Construction and Development Industry Stormwater Discharge Decision



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## Chapter 1 - Background

- Municipal SW has evolved over time
  - Urban flood control function
  - Water and resource management function
  - Environmental protection and regulatory function
- Discusses how this evolution has resulted in SW becoming a required service and how this has changed funding requirements



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## Chapter 2 – Funding Sources

- Discusses various sources of funding for stormwater programs
- Focus on service fees
- Four rate structures used as examples
  - Impervious area
  - Impervious area and gross area
  - Impervious area and % imperviousness
  - Gross property area and intensity of development

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## Chapter 3 – Legal Issues

- Focus is on SW fees
- Legality of fees primarily a question of state law
- Guidance does not analyze legal approaches in all 50 states, but highlights issues that have arisen
- Research will be needed to determine appropriate fee structure in each jurisdiction

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## Chapter 3 – Legal Issues

- SW mgt fees have been litigated and opinions reported from at least 17 states, in many cases final decisions by the state's highest court:
  - Montana-1966; Colorado-1986 & 1993; Kentucky-1989 & 1996; Ohio-1990; Oregon-1992 & 1993; Kansas-1994; Florida-1995, 1998 & 2003; Washington-1997; Virginia-1998; Tennessee-1998; Michigan-1998 & 2001; NC-1998 & 1999; SC-1999; Alabama-2001; California-2002; Georgia-2004; and Illinois-2005

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## Chapter 3 – Legal Issues

- Tax vs. Fee – Most commonly litigated issue.
  - Is a municipal SW service charge a valid user "fee" or an impermissible "tax"
  - Issue has been frequently brought by tax exempt organizations, i.e., churches, schools, and state agencies such as DOTs

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## Chapter 3 – Legal Issues

- Tax vs. Fee - Continued
  - SW fees have been upheld as valid user fees in Kentucky, Colorado, Florida, Washington, Tennessee, So Carolina, Georgia, and Illinois
  - SW fees have been struck down as invalid taxes requiring explicit voter approval under specific state laws or constitutional amendments in California and Michigan (Also rejected in two lower courts in Oregon, before later decision reversed by Oregon Supreme Court)

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## Chapter 3 – Legal Issues

- Tax vs. Fee – Continued
  - Does the user have a choice to accept or decline the service – cases in Oregon, Illinois, Missouri, W. Virginia, Ohio, and Georgia
  - Is the SW service charge a "user fee" or a "special assessment", with different procedural requirements – cases in Florida and Colorado

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## Chapter 3 – Legal Issues

### ■ Tax vs Fee - Continued

- Is the fee "reasonable" and directly related to the cost of providing the services – cases in Kentucky, Colorado, Virginia, No Carolina, and Georgia
- Are properties burdened by fees receiving a proportionate benefit - an issue in Florida, Kentucky, and Alabama

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## Chapter 3 – Legal Issues

### ■ Tax vs Fee - Continued

- Whether or not fees must be confined to cost of providing service alone, or whether any surplus can be collected and applied to system expansion or capital improvements has been litigated in Ohio, Tennessee, Colorado, and No Carolina

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## Chapter 3 – Legal Issues

### ■ Federal Facilities

- The imposition of SW fees on federal facilities involves special consideration of the tax vs. fee issue
- In general federal government has sovereign immunity against the imposition of fees and taxes by state and local authorities
- However, CWA contains an express waiver of sovereign immunity for certain pollution control related fees

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## Chapter 3 – Legal Issues

### ■ Federal Facilities – Continued

- Importantly, this waiver applies only to fees or service charges, and not to taxes.
- This distinction often hard to make in practice

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## Chapter 3 – Legal Issues

- The US Supreme Court has established a three-pronged test for determining whether fees imposed are “reasonable service charges” or taxes
  - Is the fee or service charge non-discriminatory?
  - Is it a fair approximation of the cost of the benefits received?
  - Is it structured to produce revenues that will not exceed the regulator’s total cost of providing the benefits?

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## Chapter 3 – Legal Issues

- Important case now being litigated involving a federal facility
  - Important that federal facilities be required to pay a legal and properly established SW fee
- City of Cincinnati vs. US Dept of Health and Human Services
  - NIOSH/HHS) refused to pay SW fees due
  - City brought suit in Federal Court of Claims based on implied contract for services

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### Chapter 3 – Legal Issues

- City of Cincinnati vs. US Dept of Health and Human Services
  - Claim was dismissed; City appealed; dismissal upheld; in 2003 City re-filed its claim in US District Court; and in May 2004 City filed an amended complaint based on its local ordinance and the waiver of sovereign immunity in CWA Sect 313

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### King Co GAO Ruling

- Ruling by GAO's General Counsel, June 2006
- Decision: Surface water mgt fees assessed by King Co are a tax and US (Forest Service) is constitutionally immune from the "tax"

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### King Co GAO Ruling

- GAO determined:
  - Co provides no direct, tangible services or convenience for payment of fee
  - Benefits paid for by the fee are not narrowly circumscribed but benefit general population
  - Fee not charged for a voluntary act, but supports undifferentiated benefits to entire public
  - Fee is thinly disguised tax for which liability arises as status of property owner and not from use of any King Co service

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## King Co GAO Ruling

- GAO also determined:
  - Were they to find the opposite they would still not pay
  - To be payable fees must not be unjust, unreasonable, or discriminatory
  - Fee found to be discriminatory because WA DOT is only liable for 30% of fees imposed and no similar discount offered to feds

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## Chapter 3 – Legal Issues

- SW management fees upheld in majority of states where challenged
- Legality of financing mechanism depends on close analysis of state law
- However, certain general principles emerge
  - Overall cost of program is reasonably related to value of service being provided, and funds are not used for general revenue purposes

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## Chapter 3 – Legal Issues

- General Principles- Continued
  - Structure fee so amount charged to particular properties is proportional to those properties' contribution to SW runoff
  - Provide provision so that participation can be characterized as "voluntary" such as "opt-out" provision for properties with own SW facilities or credits or offsets based on volume actually contributed to public SW system

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## Chapter 3 – Legal Issues

- General Principles– Continued
  - May be wise to seek voter approval in states such as California and Michigan with special constitutional provisions governing the imposition of any new tax

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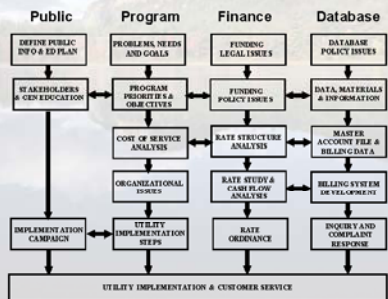
## Chapter 4 – Implementing User-Fee

- Discusses process of implementing a stormwater fee based on the following approach:

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## Chapter 4 – Implementing User-Fee Based Funding



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## Appendix-Example Stormwater Utility Programs

- Five example stormwater programs are discussed. Information provided includes
  - Community profile
  - Formation process
  - Service area
  - Role and program
  - Governance structure
  - Organization and staffing
  - Funding
  - Inter-governmental cooperation
  - Public participation

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## Appendix-Example Stormwater Utility Programs

- Example utility programs:
  - Bellevue, Washington
  - Charlotte/Mecklenburg County, NC
  - Tulsa, Oklahoma
  - Louisville/Jefferson County Metropolitan Service District, Kentucky
  - Sarasota County Stormwater Environmental Utility, Florida

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## Summary of Stormwater Funding Guidance Manual

- NAFSMA developed Guidance for Municipal Stormwater Funding under a grant from USEPA
- Guidance focuses on SW utilities/fees and legal considerations
- Report available on NAFSMA web site:
  - [www.nafsma.org](http://www.nafsma.org)

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## Dallas Consent Decree

- EPA filed suit against Dallas in 2004 for failure to implement, adequately fund and adequately staff the City's SWM Prog
- Parties negotiated a Consent Decree effective June 2006 that requires specific and detailed actions by City
- Civil Penalty - \$800,000

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## Dallas Consent Decree

- Compliance requirements
  - At least 7 technical staff in SWM Section to carry out public participation program
  - At least 2 environmental specialists in SWM Section to carry out illicit discharge program
  - Inspect all City's general services fueling & vehicle mtn operations at least once per year
  - At least 5 environmental specialists in SWM Section to carry out industrial inspection and control program

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## Dallas Consent Decree

- Compliance requirements – Continued
  - At least 5 environmental specialists in SWM Section to carry out const inspection program
  - Overall staffing – maintain in SWM Section at least 6 supervisors; 3 GIS experts; 4 coordinators; 2 office assistants; 21 environmental specialists & engrs (total of 36)

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## Dallas Consent Decree

- Compliance requirements – Continued
  - City must develop & implement an Environmental Mgt Sys and maintain a staff of at least 5 in Office of Environ Quality not including clerical, admin or support staff to carry out provisions in EMS
  - Implement 2 supplemental environmental projects that City had not planned to fund spending at least \$675,000 for one and \$525,000 for the other

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## Dallas Consent Decree

- Compliance requirements – Continued
  - Submit semi-annual reports stating what has been done to be in compliance
  - City agreed to pay stipulated penalties for failure to maintain number and kind of people; failure to make minimum number of inspections; failure to submit reports or notice requirements; and failure to satisfactorily complete supplemental environmental projects

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## Dallas Consent Decree

- Other items:
  - Consent decree not a permit and City is responsible for achieving compliance with all applicable federal, state and local laws, regulations and permits
  - After 3 years City may begin termination procedures - termination dependent on City completing all requirements of Consent Decree

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## California US District Court Decision re: Construction Industry SW Discharges

- US District Court, Central California, June 2006
- Issue was scope of EPA's obligation under CWA sections 1314(b), 1314(m), and 1316
- NRDC and Waterkeeper Alliance sued to compel EPA to promulgate ELGs and NSPSs for SW discharges from construction and development industry
- States of New York and Connecticut were Intervenor Plaintiffs and Natl Assoc of Home Builders and General Contractors of America were Intervenor Defendants

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## California US District Court Decision re: Construction Industry

- Decision:
  - Section 1314(m) imposes on EPA a nondiscretionary duty to promulgate ELGs and NSPSs for all categories of sources listed in a plan published pursuant to section 1314(m) which includes const industry
- Effluent limitations:
  - Court also noted that CWA requires that uniform, technology-based effluent limitations are to be developed in response to ELGs

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## California US District Court Decision re: Construction Industry

- What does this mean? My guess:
  - EPA will promulgate an ELG and NSPS for SW discharges from const sites which will serve as the basis for developing effluent limitations
  - Expect eventual requirement to monitor SW discharges and for those discharges to have effluent limitations which will likely include numbers

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**Storm Water Panel Recommendations to the  
California State Water Resources Control Board**

**The Feasibility of Numeric Effluent Limits  
Applicable to Discharges of Storm Water  
Associated with Municipal, Industrial and  
Construction Activities**

**June 19, 2006**